(3)

No. 03-520

FILED
JAN 8 - 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
KENNETH C. BYRNE
Supervising Deputy Attorney General
*PAUL M. ROADARMEL JR.
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2396
Fax: (213) 897-2806
Counsel for Petitioner

TABLE OF CONTENTS

	Page
PETITIONER'S REPLY TO BRIEF IN OPPOSITION	1
A. Consistency and Conflict Between the Circuits	1
B. "Stay and Abeyance" and Statute of Limitations	6
C. Rule of Civil Procedure 15(c) and "Relation Back"	6
D. "Salutary" Advisements	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Cases

Akins v. Kenney,
341 F.3d 681 (8th Cir. 2003) 3

Castille v. Peoples,
489 U.S. 346 (1989) 1, 7

Coleman v. Thompson,
501 U.S. 722 (1991) 1, 7

Duncan v. Walker, .
533 U.S. 167 (2001) 4, 6, 7

Engle v. Isaac,
456 U.S. 107 (1982) 1

Ford v. Hubbard,
330 F.3d 1086 (9th Cir. 2003) 2, 7, 8

Harris v. Nelson,
394 U.S. 286 (1969) 7

Rose v. Lundy,
455 U.S. 509 (1981) 1-3, 5, 6, 7

Sterling v. Scott,
57 F.3d 451 (5th Cir. 1995) 3

Teague v. Lane,
489 U.S. 288 (1989) 1

TABLE OF AUTHORITIES (continued)

	Page
Victor v. Hopkins, 90 F.3d 276 (8th Cir. 1996)	2-3
Warren v. Garvin, 219 F.3d 111 (2d Cir. 2000)	2
Statutes	
28 U.S.C. § 2244	1
28 U.S.C. § 2254, rule 11	6, 7
Court Rules	
Fed. R. Civ. P. 15(c)	7
Other Authorities	
Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)	2, 3, 6-8

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-520

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

JOSEPH HUNT, *Respondent.*

Cheryl K. Pliler, Warden of California State Prison – Sacramento (the Warden), respectfully submits this reply to respondent Joseph Hunt's opposition to the petition for writ of certiorari (Opposition). In her petition, the Warden seeks review on the following question: Whether, given the enactment of a one-year limitation period for filing federal habeas petitions pursuant to 28 U.S.C. § 2244, the dismissal of a "mixed" habeas petition under *Rose v. Lundy* is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies, and advises the petitioner that if the court dismisses the petition the one-year limitation period may bar any future federal claims.

A. Consistency and Conflict Between the Circuits

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489

U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). It is undisputed that Hunt's First Amended Petition filed on August 31, 1998 contained unexhausted claims; it is also undisputed that Hunt failed to dismiss his unexhausted claims, but instead lodged a Second Amended Petition on January 18, 2001, which included all but one of the claims previously found by the court to be unexhausted, plus a number of new claims. *See* App. C7-C41, G4-G7.

Hunt maintains in his Opposition that the panel's reliance on *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003), in support of its holding that the mixed First Amended Petition was erroneously dismissed does not imply "in this or any other case that . . . *un*exhausted claims be *retained* in district court while the petition[er] pursued state remedies." Opp'n at 2 (emphasis in original). To the contrary. In reaching its holding, the panel observes that Ninth Circuit authority "contemplate[s] that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims." App. A15; *see also* App. A16. No other circuit has *ever* held that a mixed habeas petition may *not* be dismissed under *Rose v. Lundy* unless the district court both informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner that if the court dismisses the petition the one-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may bar any future federal claims. *See Ford v. Hubbard*, 330 F.3d at 1109 (Silverman, J., dissenting) ("Boldly going where no court has gone before . . . .").

The panel in effect *requires* district courts to entertain mixed habeas petitions where the advisements first announced in *Ford v. Hubbard* were not provided; dismissal under such circumstances, according to the panel, is "improper." App. A17. As set forth in the Warden's petition, the panel's holding in that regard conflicts with the decisions of at least three other circuit courts of appeals. *See, e.g.*, *Warren v. Garvin*, 219 F.3d

111, 114-15 (2d Cir. 2000) ("[A]ppellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect"); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) ("We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*"); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995) ("The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims").

Most recently, in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims, in part because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. As the court noted in reviewing the claim, "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Id.* The court nevertheless rejected the petitioner's contention, and held:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . .

(2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (2000).[1] Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167 (2001)] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).

While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing

---

1. It should be noted that, of the cases cited by the *Akins* court regarding stays pending exhaustion, *Nowaczyk* involved the stay of a *fully-exhausted* petition, 299 F.3d at 80, *Palmer* upheld the dismissal of a *second*, untimely petition, 276 F.3d at 781-82, *Zarvela* required the *dismissal* of unexhausted claims prior to the grant of any stay, 254 F.3d at 380-82, and *Freeman* noted that "a prisoner who wants to pursue state relief while assuring an entitlement to federal relief can protect himself by filing in *both* courts." 208 F.3d at 577 (emphasis added). Only *Brambles* (itself a Ninth Circuit case) relied upon the principles announced by the majority in *Ford* and followed by the panel in this case.

> unexhausted claims in abeyance absent truly exceptional circumstances, such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Hunt pursued his unexhausted claims in district court. Courts, however, "are bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." 341 F.3d at 686. Accordingly, the panel's decision is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. "Stay and Abeyance" and Statute of Limitations

Despite Hunt's contention that "[n]one of the State's authorities establish any infirmity with the stay and abeyance procedure, either regarding the statute of limitations or any other provision of the AEDPA," Opp'n at 5-6, the panel, by its holding, has institutionalized a procedure that promotes the amendment of stayed petitions with newly-exhausted (but time-barred) claims. This Court has recently insisted that only the timely filing of a claim in *state court* may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80; the panel, however, holds that the timely filing of a habeas petition in *federal court* may accomplish the same goal. *See* App. A15-A17.

The panel's holding also encourages piecemeal litigation. In *Rose v. Lundy*, this Court observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. Similarly, the purpose of the AEDPA is to encourage habeas petitioners to file *timely* and *fully exhausted* single habeas petitions. *See Duncan v. Walker*, 533 U.S. at 179-80. The panel's holding, in contrast, encourages the filing of mixed habeas petitions and the consideration of time-barred claims. Nothing Hunt has cited suggests otherwise.

C. Rule of Civil Procedure 15(c) and "Relation Back"

Hunt also contends that "relation back" under Rule of Civil Procedure 15(c) should apply in this matter because "otherwise the State would attempt to trap [him] with a statute of limitations objection after [he] returned to federal court from the state exhaustion proceedings." Opp'n at 7. As set forth in the Warden's petition, however, application of Rule 15(c) to habeas cases is inconsistent with the plain meaning of

the AEDPA. *See Duncan v. Walker*, 533 U.S. at 179-80.

To allow relation back of claims where the limitation period had expired prior to their presentation in *state* court would be contrary to "the law that provides the statute of limitations applicable to the action . . . ." *See* Fed. R. Civ. P. 15(c); Rule 11, foll. 28 U.S.C. § 2254; *see also Harris v. Nelson*, 394 U.S. 286, 294 (1969) ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense").

D. "Salutary" Advisements

Finally, Hunt claims that the advisements required by the majority in *Ford v. Hubbard* and relied upon by the panel in this case "promote . . . the interests of justice." Opp'n at 12. Nothing in this Court's jurisprudence suggests that *any* advisements are required before a mixed petition may be dismissed under *Rose v. Lundy*. *See Coleman v. Thompson*, 501 U.S. at 731; *Castille v. Peoples*, 489 U.S. at 349. As Judge Silverman, dissenting in *Ford v. Hubbard*, aptly observed:

> Ford filed an improper mixed petition. The district court correctly offered him the option of either amending the petition by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition without prejudice. This is exactly what a district court is supposed to do. When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed petition without prejudice.

Ford v. Hubbard, 330 F.3d at 1107 (citations omitted).

Judge Silverman also observed that the majority's requirement that district judges inform petitioners of the AEDPA's limitation period "fail[ed] to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." *Ford v. Hubbard*, 330 F.3d at 1108. As Judge Silverman noted:

> Numerous factors can affect a petitioner's decision to delete unexhausted claims and proceed with an amended petition, rather than accept dismissal without prejudice so that unexhausted claims can be pursued in state court. For example, the meritoriousness of the unexhausted claims is an extremely important factor; so is the fact that the failure-to-exhaust might foreclose those claims forever. The availability of key witnesses is another factor. The statute of limitations is only one element in the equation, and a fact-intensive one at that. Leaving aside the question of the proper role of the court as a neutral arbiter, the district court simply is in no position to identify all of the considerations that pertain. I respectfully suggest that it is the office of the court to fairly and impartially decide the case before it, not to act as the petitioner's paralegal.

Id. at 1109.

Guidance from this Court is therefore necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 8, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General

KENNETH C. BYRNE
Supervising Deputy Attorney General

*PAUL M. ROADARMEL JR.
Deputy Attorney General

*Counsel of Record

Counsel for Petitioner